IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES BOLAND,
Plaintiff in Error,
vs.
GREAT NORTHERN RAILWAY COMPANY,
Defendant in Error.

2169
No. ~~1703~~

UPON WRIT OF ERROR FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Brief of Plaintiff in Error

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FILE

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STATEMENT OF FACTS.

This action was brought by James Boland to recover damages for the loss of his right eye, caused by a sliver of steel, from a defective cold chisel, fur-

nished him by the defendant's section foreman. Plaintiff was about 19 years of age, and merely a sectionman. He had no experience with tools, had never used a cold chisel before, and did not know that chips would fly if the chisel was too highly tempered. He knew nothing about temper in tools, and had never been told. The foreman always furnished the tools to the sectionman at that place, and gave plaintiff the chisel just a few minutes before the accident. Plaintiff was using the chisel in a proper manner, and a chip flew off and cut his eye. (Record, pp. 15, 16, 17, 18.) It was shown that the chisel was defective, in that, it was entirely too hard and brittle, and this condition resulted from its being too highly tempered. Several experts so testified for plaintiff, the chisel was introduced in evidence, and no evidence contradicting this was offered by the railway company. (Record, pp. 19, 20, 21.)

The jury returned a verdict in favor of the defendant, and from the judgment entered dismissing the action, this appeal is taken. (Record, p. 11.)

ASSIGNMENTS OF ERROR.

The following errors are assigned.

1.

The Honorable Circuit Court erred in admitting incompetent, irrelevant and immaterial evidence prejudicial to this plaintiff as follows:

The following evidence of Witness John Craig:

Q. In your experience with the Great Northern have you ever known of their furnishing section men with chisels like plaintiff's exhibit "A" or defendant's exhibit?

A. No, sir; I never knew of that. I have ordered one like that, and they told me they did not furnish me with them (pointing to exhibit "A"), and this is not a chisel, Defendant's Exhibit No. 3; this is a stone cutter's point, to cut holes in a rock to lift with the derrick.

Q. Does the section foremen have the authority to go and buy a tool and charge it to the company?

A. No, sir; I never had any instruction to buy any tools, and never was allowed to.

Q. Does the section foremen of the Great Northern have authority to obtain tools in any way except from the supply train on requisition?

A. Not as I know of.

The following evidence of witness P. H. McFadden:

In the month of August, 1909, tools for the use on the sections, and one in which Boland was, were furnished by monthly supply cars; the section foreman makes a requisition monthly, and that order is filled at the store department and sent out in the supply car once a month, and in most cases it is accompanied by the assistant roadmaster; the tools that are furnished in that way pass inspection at the shops and the storehouses at each point they are furnished from, and also by the assistant roadmaster, and many times by myself if I go up with the car, and on the section; the regular shop inspections are made before they are shipped; the duty of the assistant roadmaster is to inspect the tools, and any defective tools shall be shipped in and new ones returned in their place; the

rule is to make a trip of inspection and supply of that sort monthly; that is done by the assistant roadmaster.

Q. Is there any authority in any of the section foremen, under rules of the company, or did Pat Boland have any authority in the month of August, 1909, to procure tools in any other way?

A. None whatever.

Q. Would you consider that the necessity of that to be an emergency calling for the procuring of a tool in some way, if no suitable tool were on hand?

A. No. The matter could have remained in abeyance for several days or weeks and, I might say months, until the proper tool was supplied, if it was necessary to have that tool; the guard-rail would be held by guard-rail braces, which were supplied in that case; the guard-rail would perform its function practically as well without the bolts, temporarily; one object of the bolt is to hold the foot-guard in place, our new standard guard-rail is supplied with a metal foot-guard; the foot-guard is a piece of steel at the end of the guard-rail to protect the brakemen or anyone walking on the track from getting his foot in there, and these bolts go through the guard-rail to hold that foot-guard to its place.

Q. Will you state whether or not section foremen are required to make any regular inspections of the tools or any reports of the condition of the tools or anything of that sort?

A. They make requisitions for the tools, and in doing so they inspect them.

When the tools are supplied from the supply car inspection is made by the supplying party; the chisels marked plaintiff's exhibit "A" and defendant's exhibit No. 3, chisels of that kind are not furnished to section men of the Great Northern Railway Company; the chisel marked defendant's No. 2, is a track chisel; that is the regular chisel furnished to section men.

The following evidence of witness Patrick Boland:

Q. Do you know where the chisel that James ways carried them in my hand car.

A. Yes, sir.

Q. Where?

A. I gave it to him.

Q. Where did you get it?

A. I found it in the donkey engine.

Q. Where?

A. I found it on the scow.

Q. It was not a Great Northern chisel, was it?

A. No, I do not thnik it was.

I had the regular standard rail chisel, a track chisel; I had track chisels like exhibit No. 2. I always carried them in my hand car. (Record, pp. 43 to 45.)

II.

The Honorable Circuit Court erred in overruling plaintiff's motion for a new trial.

ARGUMENT AND AUTHORITIES.

Assignment Number 1.

Over the objection and exception of plaintiff in error the court admitted the evidence quoted under the foregoing assignment of error No. 1.

This evidence was clearly inadmissible, for the

reason that it permitted defendant to show that it had delegated the duty of furnishing the tool, to-wit: the cold chisel, to its foreman, and had forbidden him to secure one in any other way than by getting them from the supply car or by an order sent to the roadmaster.

The evidence and pleadings showed that the foreman always furnished the tools, and that on this day he gave the chisel to plaintiff in error. (Record, p. 4, lines 18 to 27; p. 5, lines 1 to 7.)

On examination, over the objection of plaintiff, the court allowed the foreman to testify that he did not get this chisel from the company but that he got it from a scow, near by, belonging to some one else. (Record, pp, 43 to 46.)

Also that he had other chisels in hand car. (Record, p. 29.)

It was shown that plaintiff did not know where the foreman got the chisel; that he did not know of any rule such as was testified to by the evidence objected to.

It appeared in the evidence that the section foreman was the stepfather of the plaintiff. (Record, p. 28.)

This Court can easily see the great prejudice that resulted to the plaintiff from this evidence. It was argued that there was no negligence on the part of the company because it had issued orders how the foreman

could get the tools and that, since the foreman did not follow these rules, but got the chisel where he had no right to get it, and since the foreman was the father of the plaintiff, that, therefore, it was not the negligence of the company but was a family affair, for which the company should not be held. It is unnecessary to state that this would defeat every case of like circumstances.

Our claim is that it was immaterial where the foreman got the chisel; that the foreman represented the master; was a vice-principal and not a fellow servant, and since the plaintiff did not know of any such rule or regulations attempting to limit the powers of the foreman, that the company was liable for the negligence of the foreman in getting and furnishing a defective tool, without regard to where the foreman secured the tool, and notwithstanding there was such a rule as testified to. Such a defense could be urged only against the suit of the foreman.

There was no such defense set out in the answer. (Record, pp. 7-10.) No allegation either of fellow servant, or of any rule such as was testified to.

In *Hermaneck v. Chicago & N. W. Ry. Co.,* 186 Fed. (C. C. A. 8th), the Court say:

"The evidence discloses that the railroad company kept a stock of tools, including claw bars, on hand at its shops in Clinton; also repaired and sharpened bars that were sent there; that it was the practice and duty of Barry, *defendant's section foreman,* when the tools

became worn and needed repairing, to send them to Clinton for repairs, and either like tools properly repaired, were sent to the foreman, or the defective and worn ones sent in were repaired and returned to him; that it would take two or three days to send the tools from the section upon which plaintiff was working to Clinton to have them repaired and returned. Such being the case, Barry, the section foreman, was a co-employe in respect to this particular matter. The duty to furnish the plaintiff with proper and suitable tools was a positive duty of defendant. Barry, the section foreman, was the employe to whom the defendant had intrusted the duty of seeing when the tools upon his section needed repairing and the duty of having them, when worn and needing repair, sent to defendant's shops for that purpose; and, as the duty of furnishing suitable and safe tools was a positive duty imposed on the defendant, it having delegated that duty to Barry, he was not in that respect, a co-employee (plaintiff) defendant. *Hough v. Ry.,* 100 U. S. 213; *N. P. Ry. v. Peterson,* 163 U. S. 346; *Homestake Mining Co. v. Fullerton,* 69 Fed. 923 (C. C. A.)"

Compare the evidence of McFadden, the roadmaster, with the above, and the case at bar is parallel with the case cited.

In the above cited case, the lower court directed a verdict for the defendant. The Circuit Court of Appeals reversed that judgment. In so doing, it was declared, *as a question of law,* that the section foreman was a vice-principal.

In *Port Blakely Mill Co. v. Garrett,* 97 Fed. 537 (9th C. C. A.), it is said:

"Stakes which fit in sockets on the side of a flat car designed for transportation of lumber are appliances necessary for the proper equipment of the car, and the railroad company is not relieved from liability

for personal injury sustained by an employe by reason of the breaking of such stakes on a loaded car, where they were defective and insufficient in number, by showing that they were made and supplied by a co-servant of the person injured."

Also in *Great Northern Ry. Co. v. McLaughlin,* 70 Fed. 669 (9th C. C. A.), we find the following: In the statement of facts it is said:

"There was some conflict as to whether Johnson, the foreman, could hire and discharge men, and as to whether the injury was caused by the defective skid or by the negligence of the workman in irregularly pushing up the rails on the skids." (We might remark, that in the case at bar, there was *no conflict* as to the foreman being authorized to hire and discharge all the men on his section and as to him alone furnishing all the tools to his men).

"The contention of the counsel that because McLaughlin was employed to help load and unload the cars it was his duty and the duty of his fellow servants, to select the skids to be used for that purpose, and that the railroad company had performed its duty when it placed proper skids in the yard that might have been selected for that purpose, ignores some of the conditions which the testimony tended to establish, and for this reason should not be sustained. Let us suppose, for purpose of illustrating the principle contended for by counsel, and embodied in the third instruction heretofore referred to, that the master was an individual, instead of a railroad corporation, it would of course follow, from the argument of counsel, that if the individual master had himself selected the skids, the tools and appliances with which his workmen were to load and unload cars, and they were defective and dangerous, and known to be unsafe by him, and the condition of the skids were wholly unknown to the employe, who was injured by their use, this employe could not recover because, in the line of the general duty of the employe, he might have been called to select the skids himself. Is this not going at least

one step too far? (p. 673). * * * It was the duty of the railroad company to use ordinary care in the selection of suitable skids and appliances, and to provide a reasonably safe place for the laborers to work in unloading its cars. * * * It matters not to the employe by whom that safety is secured or the reasonable precautions taken.''

In this case, the railway's counsel requested the court to charge that if the jury found that the foreman had the power to hire and discharge the men and to superintend them in their work, this would not constitute him a vice-principal or representative of the company, etc.? The refusal of the Court to give such instruction was held not to be error.

The evidence objected to violates the elementary rule laid down in both Federal and State Courts, as follows:

''It is the duty of the master to furnish a servant with reasonably safe appliances with which to work * * * *which duty cannot be delegated* by him so as to relieve him of liability for injuries resulting from its violation.''

Electric Company v. Clark, 114 Pacific —.

Hough v. Co., 100 U. S. 216.

Neely v. Co. (Okla.), 64 L. R. A. 152.

Also:

''It is negligence of the master for the section foreman to furnish section men a defective maul'.'

Guthrie v. Co., II Lea (Tenn.), 372.

In *Telander v. Sunlin,* 44 Fed. 564, it is held that

where the master does not furnish the necessary tools, that the foreman may borrow them, and if he borrows defective tools, the master is liable, if damages follow their use.

In *Garrett v. Port Blakeley Co.*, 97 Fed. 573 (9th), this Court held the master liable for injury from defective stakes in a lumber car, although they were furnished and made by a fellow-servant.

In *Mining Co. v. Muset*, 114 Fed. 66 (9th):

> "The master owes a positive duty to its employed —the duty of affording them safe place to work in and safe tools to work with. That duty was necessarily delegated to a representative—an individual who for that purpose stood in the corporation's place."

We had the instructions of the court incorporated in the record so this court could see that the trial court did not cure the error and prejudice by his charge. (Record, pp. 29 to 40.)

Assignment Number 2.

If the evidence objected to and considered in the foregoing argument was improperly admitted, and should have been excluded, then there was no evidence to sustain the verdict. The evidence was uncontradicted as to the power of the foreman, as to the grade of plaintiff, of the defective and dangerous character of the chisel. There was no evidence on the part of the defendant but that which was clearly improper and prejudicial.

From the foregoing, it clearly appears that the judgment appealed from should be set aside and a new trial granted.

Respectfully submitted,

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